FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 523

AB ELECTROLUX,

Petitioner,

vs.

NATIONAL GAS APPLIANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KENNETH F. BURGESS,
WALTER J. CUMMINGS, JR.,
WILLIAM M. McGOVERN, JR.,

11 South La Salle Street,
Chicago 3, Illinois,

Attorneys for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Reasons For Granting The Writ	4
Conclusion	15
Appendix	16

CITATIONS

Cases:

Bernhardt v. *Polygraphic Co.*, 350 U. S. 198 ..... 12, 13

Bomze v. *Nardis Sportswear*, 165 F. 2d 33 (C.A.2, 1948) 5, 8

Compania De Astral, S. A. v. *Boston Metals Co.*, 205 Md. 237, 107 A. 2d 357 (1954), certiorari denied, 348 U. S. 943 6

Equitable Life Ins. Co. v. *Halsey, Stuart & Co.*, 312 U. S. 410 13

Erie R. Co. v. *Tompkins*, 304 U. S. 64 7

Erlanger Mills v. *Cohoes Fibre Mills*, 239 F. 2d 502 (C.A.4, 1956) 11, 13

Fidelity Trust Co. v. *Field*, 311 U. S. 169 ..... 7, 12

George v. *Haas*, 311 Ill. 382, 143 N. E. 54 (1924) ... 11

Grobark v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959) 3, 5, 7, 8, 9, 10, 11, 12, 15

Grobark v. *Addo Machine Co.*, 18 Ill. App. 2d 10, 151 NE. 2d 425 (1958) 9

Hanson v. *Denckla*, 357 U. S. 235 7

Huddleston v. *Dwyer*, 322 U. S. 232 ..... 12, 13

International Shoe Co. v. *Washington*, 326 U. S. 310 ..... 6, 7, 11

McGee v. *International Life Ins. Co.*, 355 U. S. 220 .. 7

PAGE

Mississippi Wood Preserving Co. v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953) 5, 8, 11

Nugen v. *Paul-Lewis Laboratories*, 132 F. Supp. 448 (S.D.N.Y., 1955) 14

Oakes v. *Chicago Fire Brick Co.*, 388 Ill. 474, 58 N. E. 2d 460 (1945) 11

Partin v. *Michaels Art Bronze Co.*, 202 F. 2d 541 (C.A.3, 1953) 5, 8, 14

Peresipka v. *Elgin, Joliet & Eastern Ry. Co.*, 231 F. 2d 268 (C.A.7, 1956) 11

Pulson v. *American Rolling Mill Co.* 170 F. 2d 193 (C.A.1, 1948) 5, 8

L. D. Reeder Contractors v. *Higgins Industries*, 265 F. 2d 768 (C.A.9, 1959) 11

Riverbank Laboratories v. *Hardwood Products Corp.*, 350 U. S. 1003 ..... 13, 14, 15

Rosenberg Co. v. *Curtis Brown Co.*, 260 U. S. 516 .. 11

Satterfield v. *Lehigh Valley R. Co.*, 128 F. Supp. 669 (S.D.N.Y., 1955) 14

Scholnik v. *National Airlines, Inc.*, 219 F. 2d 115 (C.A.6, 1955), certiorari denied, 349 U. S. 956 ... 13

K. Shapiro, Inc. v. *New York Central R. Co.*, 152 F. Supp. 722 (E.D.Mich., 1957) 13, 14

Steele v. *General Mills Co.*, 329 U. S. 433 13

Texarkana v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188 13

Vandenbark v. *Owens-Illinois Co.*, 311 U. S. 538 ... 12

Wichita Royalty Co. v. *City National Bank*, 306 U. S. 103. 13

Woods v. *Interstate Realty*, 337 U. S. 535, reversing 168 F. 2d 701, 170 F. 2d 694 (C.A.5, 1948) 14

Woodworkers Tool Works v. *Byrne*, 191 F. 2d 667 (C.A.9, 1951) 13

PAGE

STATUTES:

Illinois Civil Practice Act (2 Ill. Rev. Stats. (1957) ch. 110):

§17 ..... 2, 6
§17(1) 11
§17(1)(a) 2, 3, 6, 8, 10
§17(1)(d) 7
§17(3) 2, 11

Judicial Code (28 USC):

§1254(1) 1
§1292(b) 3

Maryland Code (1951) Art. 23, Sec. 88(d) 6
Vermont Statutes (1947) Section 1562 6

MISCELLANEOUS:

Comment, "The Isolated Contract As a Basis of Jurisdiction Over Nonresidents", 22 U. Chicago L. Rev. 674 (1955) 13
Kurland, "Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases", 67 Yale L. J. 187, 211-212, note 120 (1957) 14
1 Moore, Federal Practice (2d ed., 1959) ¶ 0.317[5] 14
Note, 56 Columbia L. Rev. 394, 398-403 (1956) 14
Note, 69 Harv. L. Rev. 508 (1956) 14
Note, 67 Yale L. J. 1094, 1101-1103 (1958) 14
Schwartz, "Federal Court Application of the 'Doing Business' Test in Diversity Cases", 5 Duke Bar J. 129 (1956) 14
Supreme Court Rule 19(1)(b) 5, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. .....

AB ELECTROLUX,

Petitioner,

vs:

NATIONAL GAS APPLIANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner AB Electrolux prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 24, 1959.

OPINION BELOW

The opinion of the court of appeals is not yet reported and is printed in the Appendix hereto, *infra*, pp. 16-23.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1959. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Whether a federal court of appeals in a diversity case can refuse to follow the forum state Supreme Court's recent construction of a state statute concerning jurisdiction over nonresidents.

STATUTE INVOLVED

Section 17 of the Illinois Civil Practice Act provides in pertinent part (2 Ill. Rev. Stats. (1957) ch. 110, § 17):

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this state;
>
> . . . . . .
>
> "(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

STATEMENT

This action was brought by National Gas Appliance Corporation, a Delaware corporation, to recover damages for a purported breach of an alleged contract for the sale of cooling units for refrigerators by AB Electrolux, a Swedish corporation not licensed to do business in Illinois (R. 2-5).[1] The action was brought in the Circuit Court of

1. Two other counts involving an alleged tortious conspiracy between Electrolux and The Manitowoc Company, Inc., a Wisconsin corporation, are not involved in this petition, because Count II concerned only Manitowoc and Count III was held not to state a cause of action.

Cook County, Illinois, and was removed to the United States District Court for the Northern District of Illinois by another party[2] on the grounds of diversity of citizenship (see R. 1). Process was served on AB Electrolux by delivering a copy of the summons to a lawyer in New York who had been retained by Electrolux (R. 50).

Petitioner filed a motion to dismiss the action or to quash the service of summons on the grounds that the court had no jurisdiction over it and that the service on a lawyer was improper (R. 48-49). The motion was denied by the district court, which, however, approved an interlocutory appeal under Section 1292(b) of the Judicial Code (28 USC § 1292(b)) (R. 60-61). While the appeal was pending, the Supreme Court of Illinois rendered its decision in *Grobark v. Adda Machine Co.*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959), which held Section 17(1)(a) of the Illinois Civil Practice Act (*supra*, p. 2) did not confer jurisdiction in an identical situation. This case was brought to the attention of the court of appeals by petitioner in its brief and oral argument. Nevertheless, without even discussing the controlling *Grobark* case, the court of appeals affirmed the district court's judgment that it had jurisdiction over Electrolux.

The alleged contract on which respondent relies was contained in a letter sent by petitioner from Sweden on January 21, 1958, to respondent in Illinois, which respondent claims to have accepted by a cable from Illinois to Stockholm on January 29 (R. 9-12). Petitioner denies that a contract was formed, since both the alleged offer contained in such letter and also the purported acceptance refer to the drawing up of an agreement which was never done (R. 11, 12). Petitioner asserts, furthermore, that

2. The Manitowoc Company filed the removal petition. See note 1, *supra*.

under the law of Illinois the district court had no jurisdiction over it regardless of whether or not a contract was formed by this correspondence.

The letter on which respondent bases its claim states that it was "based on our verbal conversations in Stockholm" (R. 9), where respondent's representatives visited for twelve days in 1957 (R. 25-26, 31-32). Respondent claimed in the court below that contract negotiations also took place during a visit by one of petitioner's engineers to Illinois, although the complaint does not so allege and petitioner denies this (R. 26). Petitioner asserts that under the law of Illinois the district court had no jurisdiction over it regardless of where the negotiations took place.

Under the alleged contract, petitioner was to sell respondent cooling units to be placed in refrigerators and sold by respondent (R. 2, 9). Delivery of these units was to be made in Europe, either at an Electrolux factory or f.o.b. Swedish or English port (R. 9-10). Respondent meanwhile began negotiations with The Manitowoc Company for the manufacture of the refrigerators in Wisconsin (R. 5). Damaging information as to respondent's financial background forced petitioner to break off negotiations in February 1958, which it did by cable from Sweden (R. 15).

Petitioner is a Swedish corporation with headquarters in Stockholm. It is not licensed to do business in Illinois. It does not have any office, plant or warehouse in Illinois, nor does it have any resident officers, agents or employees in that state. (R. 50-52.) Respondent is a Delaware corporation not licensed to do business in Illinois, although it did have an office there (R. 2, 59).

REASONS FOR GRANTING THE WRIT

The court below failed to follow the recent decision of the

Illinois Supreme Court in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), construing the state jurisdictional statute, in holding that the district court had jurisdiction over petitioner AB Electrolux on the basis of an "offer" mailed from Sweden and allegedly accepted by cable from Illinois. There are two reasons why the writ of certiorari should be granted to correct this error. First, the court of appeals decided an important question of state law in conflict with the law of Illinois as declared by its highest court. See Supreme Court Rule 19(1)(b). Secondly, in its refusal to follow the *Grobark* case, the decision below conflicts with decisions of other courts of appeals, such as *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953) and *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C.A.1, 1948), which have followed state court decisions in declining to exercise jurisdiction over foreign corporations in diversity cases. Because the court of appeals did not follow the applicable and current ruling of the Supreme Court of Illinois, this Court should exercise its supervisory power and reverse summarily.

1. Although the question has never been decided by this Court, a majority of courts have held that state law should govern a federal court in a diversity case in deciding whether it can exercise jurisdiction over a foreign corporation not licensed to do business in the state. *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C.A.1, 1948); *Bomze* v. *Nardis Sportswear*, 165 F. 2d 33 (C.A.2, 1948); *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541 (C.A.3, 1953); *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953). There are contrary holdings (see pp. 13-14, *infra*), and the present case affords an opportunity for this Court to determine the issue finally.

In upholding jurisdiction, the court below did not follow the Illinois Supreme Court's construction of Section 17 of the Illinois Civil Practice Act (*supra*, p. 2), which provides that a nonresident who "in person or through an agent" does certain enumerated acts within the state, thereby submits to the jurisdiction of the courts of Illinois as to a cause of action arising from said acts. The act relied on by respondent was "the transaction of any business within this State" within the meaning of Section 17(1)(a) of the Illinois Civil Practice Act (*ibid.*). The alleged contract on which suit was based in the present case was not executed in Illinois by any agent of petitioner, but rather was contained in a letter sent from Sweden to Illinois. Moreover, the Illinois statute, unlike those of some other states, does not make a single contract made within the state a sufficient basis for jurisdiction. Cf. Maryland Code (1951) Art. 23, Sec. 88(d);[3] Vermont Stats. (1947) Sec. 1562. The court below stated that two visits made by representatives of petitioner to Illinois "constitute at least such minimal contacts with that state that the maintenance of this suit there does not offend traditional notions of fair play and substantial justice" (Appendix, *infra*, p. 20). But "fair play" and "substantial justice" are not the tests stated in the Illinois statute. This statement by the court shows that it *considered* only the due process problem raised by the federal constitution, which should not even be considered unless jurisdiction can be asserted under the law of the state. (See cases cited *supra*, p. 5.) The only two cases upholding jurisdiction cited by the court below, *International Shoe Co.* v. *Washington*, 326 U. S. 310, and

3. Even under the broader Maryland statute, the mailing in Maryland of an acceptance of an offer from outside the state is insufficient to sustain jurisdiction. See *Compania De Astral, S. A.* v. *Boston Metals Co.*, 205 Md. 237, 255; 107 A. 2d 357, 364 (1954), certiorari denied, 348 U. S. 943.

McGee v. *International Life Ins. Co.*, 355 U. S. 220, also concern only the constitutional question and are not determinative or even relevant in deciding the issue of state law.[4] The court's conclusory statement that the district court had jurisdiction "under Illinois law" is totally without foundation, for no state decisions upholding jurisdiction are cited in support and the decision of the Illinois Supreme Court in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), is contrary.

In view of the fresh interpretation of the jurisdictional statute by the Supreme Court of Illinois in the *Grobark* case, the court below was not at liberty to "overrule" that decision and make its own interpretative construction. In following the mandate of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to abide by "state law," federal courts are not free to make an independent interpretation of a state statute contrary to that adopted by the courts of the state. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, involved the validity of trusts created by bank deposits under New Jersey law. Such trusts were legalized by a state statute, but two decisions by New Jersey appellate courts had nevertheless held them unenforceable. The court of appeals purported to follow state law but, as here, ignored the court decisions and applied the statute as written. This Court reversed, holding:

4. Moreover these two cases are both easily distinguishable from the present one. In *International Shoe* the defendant maintained 11-13 resident salesmen in the state and its activities were regular and systematic, resulting in a large volume of sales in the state. 326 U. S. at pp. 313, 320. Petitioner on the other hand has no agents in Illinois and has made no sales there. The *McGee* case was a suit on an insurance policy by a resident of the forum. Insurance is a field in which the state has a special interest in protecting its residents. See *Hanson* v. *Denckla*, 357 U. S. 235, 252; cf. Illinois Civil Practice Act § 17(1)(d) (2 Ill. Rev. Stats. (1957), ch. 110 § 17(1)(d)).

> "Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute.
>
> * * * * *
>
> "* * * the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals." 311 U. S. at pp. 178, 180.

Similarly in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, 194 (C.A.1, 1948), the court noted that the language of the state statute governing service on foreign corporations was "very broad" but had been limited by judicial interpretation of the Supreme Judicial Court of Massachusetts, which the federal court was bound to follow. See also *Bomze* v. *Nardis Sportswear*, 165 F. 2d 33 (C.A.2, 1948); *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541 (C.A. 3, 1953); *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953).

Therefore the court below erred in not following the interpretation of Section 17(1)(a) of the Illinois Civil Practice Act made by the Illinois Supreme Court in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959). That case, like the present one, was a suit for breach of contract against a foreign corporation not licensed to do business in Illinois and which had no office or resident agents in the state. The contract on which plaintiff relied was also contained in a letter mailed to plaintiff by defendant from outside the state. 16 Ill. 2d at p. 428. Also as in the present case, a representative of the defendant had visited Illinois while the contract was being negotiated. In fact, in the *Grobark* case, the terms of the contract were

entirely negotiated in Illinois by the defendant's president. *Idem*, at pp. 427-428. By the contract plaintiffs became the exclusive distributors of Addo's machines in Illinois, and the breach alleged was that defendant had appointed other distributors in Illinois and had permitted them to use the Grobarks' list of customers and dealers. *Idem*, at p. 428. The Appellate Court of Illinois affirmed an order of the trial court quashing the service of summons, holding that: "the defendant corporation did not submit to the jurisdiction of the courts of Illinois within the meaning of section 17 of the Civil Practice Act" (18 Ill. App. 2d 10, 15; 151 N. E. 2d 425, 427-428 (1958)).

The Supreme Court of Illinois affirmed, agreeing that the defendant foreign corporation was "not transacting business in Illinois" and therefore "did not submit to the jurisdiction of the Illinois courts" (16 Ill. 2d at p. 438). The Court stated:

> "In the present case, the record shows that the defendant Addo Machine Company, Inc., is a corporation organized conformably to the laws of the state of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees or other persons within the State." (pp. 436-437).

All this applies equally to the petitioner Electrolux in the present case. The *Grobark* case was a stronger one for jurisdiction because Addo had actually performed under the contract for two years and sold over $150,000 worth of machines in Illinois through its distributors (p. 428). But the court found that the relationship between the Grobarks and Addo was that of seller and purchaser:

> "We concur in the conclusion of the Appellate Court that plaintiffs were not doing business in Illinois as defendant's agents. They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves." (p. 437.)

This is also undisputably true in the present case, where the petitioner, if the alleged contract had been entered into and performed, was merely to sell cooling units outside of Illinois to respondent, which was to install them in refrigerators sold at its own prices and under its own name (R. 9-12).

The *Grobark* case holds that neither the making and negotiating of a contract within a state nor sales to independent purchasers within the state under such a contract constitutes the "transaction of any business" justifying jurisdiction over foreign corporations under Section 17(1)(a) of the Illinois Civil Practice Act. Under this principle, jurisdiction cannot be asserted over petitioner in the present case. The only relevant factual distinctions between the present case and *Grobark* make it obvious that the court which decided *Grobark* would *a fortiori* deny jurisdiction here. In *Grobark* both parties performed under the contract for two years, while Electrolux denied that its letter constituted a contract at all and no shipments were ever made under it. Whereas in *Grobark* the breach of contract took place in Illinois, where Addo appointed rival distributors and permitted them to use plaintiffs' customer list, the alleged breach in the present case took place in Europe where Electrolux was to perform by delivering the cooling units to independent carriers (R. 10).[5] In *Grobark*

5. The fact that the alleged contract was purportedly made in Illinois when plaintiff "accepted" defendant's letter is not signifi-

plaintiffs were Illinois citizens who had built up a market in Illinois for defendant's machines, whereas here respondent is a Delaware corporation with no established business in Illinois and the refrigerators were to be manufactured in Wisconsin (R. 2, 16-22).

The decision below relied primarily on two visits by representatives of defendant to Illinois.[6] However, sporadic visits to a state by a foreign corporation's agents are not sufficient to sustain jurisdiction if the corporation has no resident agent within the state. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 317, 318; *Rosenberg Co.* v. *Curtis-Brown Co.*, 260 U. S. 516; *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502 (C.A.4, 1956); *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953); *L. D. Reeder Contractors* v. *Higgins Industries*, 265 F. 2d 768 (C.A.9, 1959). This is clearly the law in Illinois under the *Grobark* case, for there the contract was negotiated entirely during a visit to Illinois by the defendant's president, and this was held not to warrant jurisdiction (see pp. 8-9, *supra*).

The court below did not discuss the *Grobark* case or

cant, since, under Illinois law, the place of performance rather than the place of making is considered the significant factor in choice of law. *George* v. *Haas*, 311 Ill. 382, 143 N. E. 54 (1924); *Oakes* v. *Chicago Fire Brick Co.*, 388 Ill. 474, 58 N. E. 2d 460 (1945); *Peresipka* v. *Elgin, Joliet & Eastern Ry. Co.*, 231 F. 2d 268, 272 (C.A. 7, 1956).

6. This breach of contract cause of action did not arise from these two visits, as required by Section 17 (1) and (3) (*supra*, p. 2). Moreover, the court below ignored the fact that the alleged contract states that it was based on negotiations in Sweden (R. 9), which respondent's representatives visited for twelve days (R. 25-26, 31-32). Since the contract was negotiated in Sweden, the complaint did not allege that any contract negotiations took place in Illinois (R. 2-4, 24-28). Actually the so-called offer was sent from Sweden a week *before* the January 1958 Illinois visit of Electrolux representatives (R. 9-34) so that the "contract" could not have been negotiated in Illinois.

attempt to distinguish it in any way. When the district court upheld jurisdiction in the present case it did not have the benefit of the Illinois Supreme Court's *Grobark* decision, which was announced after appeal was pending to the Seventh Circuit. But even if the district court's decision was correct when rendered, it was the duty of the court of appeals to reverse on the basis of the intervening state court decision so that the result would be in accordance with the then controlling decision of the highest state court. *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538. This is not a case where state law can be found only in appellate court decisions, cf. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, or from antiquated opinions of the state's highest court, cf. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, or from dicta or holdings on an analogous point. State law has been made clear by a recent decision of the highest state court in a case indistinguishable from the present one.

2. The issues raised by the present case are important ones which warrant the attention of this Court. The failure of the court below to apply the latest decision of the Illinois Supreme Court raises an appropriate question for certiorari and calls for the exercise of this Court's supervisory power. One ground for granting the writ is that a court of appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law." Supreme Court Rule 19(1)(b). Though this Court has stated that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts," *Huddleston* v. *Dwyer*, 322 U. S. 232, 237, the Court in the very case which this statement was made reversed the court of appeals for failure to apply a recent state Supreme Court decision. The opinion below, which fails to follow or discuss state decisions, is not a "con-

sidered determination" of state law that should be respected by this Court. Even when a court of appeals has clearly recognized that state law was controlling, this Court has frequently granted certiorari to reverse erroneous interpretations of state law. *Steele* v. *General Mills Co.*, 329 U. S. 433; *Huddleston* v. *Dwyer*, 322 U. S. 232; *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103; *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003 (*semble*). When, as in the present case, the state law is clear, there is no need to defer to the opinion of the court of appeals as to what the state law is. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 205.

The question of state law involved in the present case is an important one—whether a foreign corporation without agents or property in a state is subject to suit on a single "contract" mailed into the state. See Comment, "The Isolated Contract As a Basis of Jurisdiction Over Non-residents", 22 U. Chicago L. Rev. 674 (1955). Another issue of importance is whether a company which contracts to make interstate sales to independent purchasers within a state is transacting business there so as to be subject to the jurisdiction of the state. Cf. *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502, 509 (C.A.4, 1956). Moreover, the question whether state or federal law governs the jurisdiction of federal courts over foreign corporations in diversity cases is one which frequently recurs and yet has never been resolved by this Court. The decisions below are in conflict.[7] Though a majority of courts hold that state law

7. *Scholnik* v. *National Airlines, Inc.*, 219 F. 2d 115 (C.A. 6, 1955), certiorari denied, 349 U. S. 956, and *Woodworkers Tool Works* v. *Byrne*, 191 F. 2d 667 (C.A.9, 1951) do not refer to state law and apparently hold that federal law is controlling. *K. Shapiro, Inc.* v. *New York Central R. Co.*, 152 F. Supp. 722 (E.D.Mich.,

must control (unless a constitutional question is raised), the decision of this Court in *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003, has raised doubts which can be resolved by granting certiorari and reversing the judgment in the present case. These doubts may have influenced the decision below, which straddles the issue by referring to a state statute without following or even discussing the state cases construing it.

The decision below leaves an undesirable discrepancy between the law actually governing state and federal courts in future cases. Cf. *Woods* v. *Interstate Realty*, 337 U. S. 535, reversing 168 F. 2d 701 (C.A.5, 1948). Unfair discrimination will result if corporations not subject to suit in Illinois state courts are suable in federal courts in Illinois. Note, 67 Yale L. J. 1094, 1101-1103 (1958). Thus unless the decision below is reversed, litigants in Illinois with claims for breach of contract against corporations not transacting business in the state through resident agents will be able

1957); *Nugon* v. *Paul-Lewis Laboratories*, 132 F. Supp. 448 (S.D.N.Y., 1955); and *Satterfield* v. *Lehigh Valley R. Co.*, 128 F. Supp. 669 (S.D.N.Y., 1955) specifically hold that federal law is governing and are thus contrary to the decisions cited *supra*, p. 5. See also the concurring opinion of Chief Judge Biggs in *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541, 545 (C.A.3, 1953) and 1 Moore, Federal Practice (2d ed., 1959) ¶0.317[5]; Schwartz, "Federal Court Application of the 'Doing Business' Test in Diversity Cases", 5 Duke Bar J. 129 (1956); Note, 69 Harv. L. Rev. 508 (1956); cf. Note, 56 Columbia L. Rev. 394, 398-403 (1956).

8. The Court of Appeals for the Seventh Circuit applied Illinois law in that case to dismiss the defendant foreign corporation. 220 F. 2d 465. This Court reversed *per curiam*. The Seventh Circuit could not understand the reason. 236 F. 2d 256. At least one court has held that the *Riverbank* decision means that federal law governs the question of jurisdiction over foreign corporations in diversity cases. *K. Shapiro* v. *New York Central R. Co.*, 152 F. Supp. 722 (E.D.Mich., 1957), discussed in 67 Yale L. J. 1094 (1958). On the other hand a commentator has suggested that this Court may have merely wished to correct the Seventh Circuit's misinterpretation of Illinois law. Kurland, "Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases," 67 Yale L. J. 187, 211-212, note 120 (1957).

to sue in federal but not in state courts. This will result in forum shopping and add to the burden of federal courts unnecessarily, because plaintiffs who would otherwise bring suit in state courts will now sue in the federal courts in Illinois where they can avoid the *Grobark* ruling. Plaintiffs whose claims are less than $10,000 or who wish to join Illinois citizens as codefendants will be unfairly discriminated against, for they will be unable to take advantage of the more liberal jurisdictional requirements of the federal courts which were announced by the decision below. Unless corrected by this Court, this situation will be repeated in other states as other circuits feel free to refuse to follow controlling jurisdictional decisions of state courts in diversity cases.

CONCLUSION

In the exercise of this Court's supervisory power, a writ of certiorari should be granted to compel the court of appeals to respect the recent construction of the Illinois jurisdictional statute by the Supreme Court of Illinois. In *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003, this Court *per curiam* reversed the court below because of its misinterpretation of state law. We suggest that similar relief is appropriate here, but because of the court's blatant refusal to respect the *Grobark* decision of the Supreme Court of Illinois, summary reversal is justified in this case.

Respectfully submitted,

KENNETH F. BURGESS,
WALTER J. CUMMINGS, JR.,
WILLIAM M. MCGOVERN, JR.,
Attorneys for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

November 1959.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 12587 SEPTEMBER TERM, 1959, SEPTEMBER SESSION, 1959.

NATIONAL GAS APPLIANCE CORPORATION, a Delaware corporation,
Plaintiff-Appellee,
v.
AB ELECTROLUX, a Swedish corporation,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 24, 1959

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Pursuant to leave granted, AB Electrolux, a Swedish corporation, herein also called defendant, has appealed from an order of the district court denying its motion to dismiss the action brought by National Gas Appliance Corporation, a Delaware corporation, herein referred to as plaintiff, or alternatively to quash the return of service of summons herein.[1]

Plaintiff's complaint named as an additional defendant The Manitowoc Company, Inc., a Wisconsin corporation. It is not a party to the motion to dismiss, or to this appeal.

Count I charges a breach of contract by defendant, count II is directed against The Manitowoc Company only, while

1. This action was commenced in an Illinois state court and was removed to the district court.

count III sounds in tort and asserts a conspiracy against plaintiff on the part of defendant and The Manitowoc Company.

On this appeal the relevant facts appear in the complaint, as amended, in affidavits accompanying defendant's motion to dismiss and in affidavits filed by plaintiff in opposition to that motion.

The terms of the contract involved in count I appear in a letter dated January 21, 1958, mailed by defendant, from Stockholm, Sweden, to plaintiff's president, in Chicago, Illinois, as accepted on January 29, 1958 by plaintiff's telegram to defendant. On oral argument, counsel for defendant stated that we may assume for the purpose of this appeal that the receipt of this letter and this telegram respectively constituted the making of a contract. Thereby, in effect, defendant agreed to sell plaintiff cooling units, functioning on natural or manufactured gas, which units were to be shipped to the United States for installation in refrigerator cabinets manufactured for plaintiff in this country. The assembled product was then to be marketed by plaintiff throughout the United States.

The making of said contract followed mail, telephone and telegraph negotiations between the parties beginning in August 1957. In addition thereto, plaintiff relies particularly on the acts of chief engineer Hugo Ullstrand of defendant and Edmund A. Fenander, of New York City, referred to by Mr. Ullstrand as "our United States representative".

About October 29, 1957 Ullstrand came to plaintiff's place of business in Chicago in connection with the problem of fabricating a cabinet to house the Electrolux unit. He spent there about four days, as well as several evenings. He went to Aurora, Illinois, and saw tests made on sample cabinets and was taken by plaintiff's men to the Peoples' Gas Light and Coke Company plant and offices where they and Ullstrand conferred with officers of that company. During his stay in Chicago he discussed with representatives of plaintiff many details to be incorporated in the

proposed contract with defendant, the making of which depended on plaintiff's being able to fabricate a box to house its unit.

Immediately upon his return to Stockholm, Ullstrand, on November 12, 1957, wrote to plaintiff's president a lengthy letter, discussing the results of the aforesaid tests. He made suggestions for further tests, and expressed himself in favor of "the arrangement shown in the attached drawing C-390056".

On January 28, 1958, Ullstrand again came to Chicago to discuss the engineering features of a cabinet, about the manufacture of which plaintiff had contacted The Manitowoc Company, as well as to discuss the plans for fabrication of the complete unit at its factory. He wanted to help plaintiff with remaining problems in the perfection of the refrigerator. He was accompanied to Chicago by Fenander. Fenander said that he traveled over the United States for defendant investigating new processes and negotiating with suppliers for products and materials that could be used by defendant in its manufacturing business.

Ullstrand spent all of January 29, 1958 in plaintiff's offices in Chicago, talking to its president about the manufacture of the refrigerator and cabinets, and called a consultant, Dr. Robert S. Taylor, formerly chief engineer of Servel, Inc., from plaintiff's office and discussed certain of plaintiff's problems, one being the adjustment of the gas burner.

On January 30, 1958, Ullstrand and plaintiff's president flew to The Manitowoc Company in Wisconsin and inspected the cabinet being fabricated around an Electrolux unit for plaintiff, returning to Chicago that evening.

Ullstrand had brought from Sweden and delivered to plaintiff an Electrolux burner and gas control device, adapted to the units to be sold by his company to plaintiff. After lunch on January 31, 1958 Ullstrand and plaintiff's president went to a laboratory in Chicago for tests on the Electrolux gas burner and control.

On February 10, 1958, defendant cabled to plaintiff: "* * * further damaging information your financial background and dealings forces us withdraw offer forthwith we consequently unable deal with you."

Relying upon this cablegram as a breach of contract, plaintiff sues defendant in count I for damages.

1. Defendant contends that the district court erred in denying its motion to dismiss the action of plaintiff for want of jurisdiction of defendant. It relies on § 17 (1) (a) of the Illinois Civil Practice Act, 1955 (§17 (1) (a), Ch. 110, Ill. R. S. 1957), which reads:

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, * * * to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this State;
>
> "(b) The commission of a tortious act within this State; * * *".

Under the assumption of defendant's counsel, *ante*, defendant's letter of January 21, 1958 to plaintiff and the latter's telegram of acceptance on January 29, 1958 constituted a contract. It is that contract upon which plaintiff bases count I, claiming a breach. That contract was the culmination of negotiations, conferences, contacts and meetings between the agents of plaintiff and defendant. A substantial part thereof occurred in the state of Illinois. While defendant argues in this court that its chief engineer Ullstrand did not come to Chicago to negotiate any contract, but to discuss technical engineering problems, the evidence is uncontradicted that both he and defendant's United States representative, Fenander, in Illinois, at plaintiff's plant and elsewhere, were busily engaged in satisfying plaintiff that it would be advantageous for it to use defendant's cooling units. Their efforts were obvi-

ously directed toward the consummation of the contract in question.

These acts of defendant's representatives, which occurred in Illinois, constitute at least such minimal contacts with that state that the maintenance of this suit there does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220. *Cf. Hanson* v. *Denckla*, 357 U.S. 235, 251; *Orton* v. *Woods Oil and Gas Co.*, 249 F.2d 198; *Kane-Martin* v. *Brooks*, 267 F.2d 394; *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426.

We are not at this time concerned with the merits of this case. We merely hold that the district court, under Illinois law, has jurisdiction of the cause of action asserted against the defendant AB Electrolux in this case.

2. In its brief, plaintiff asserts that count III of its complaint, as amended, "charges in tort that Electrolux and Manitowoc *conspired* to bypass plaintiff and by themselves assemble and sell gas refrigerators in this country, to the complete exclusion of plaintiff from the refrigeration field". (Italics supplied.) However, a careful reading of count III reveals that an attempt to make a charge of conspiracy is abortive. After realleging by reference many part of counts I and II, count III in paragraph 23, alleges:

> "Defendant, Electrolux, *in its refusal and neglect to perform its contract with plaintiff* has willfully, maliciously and unlawfully conspired, combined and confederated by and with Manitowoc to refuse to permit plaintiff to proceed with its marketing and sale throughout the United States of gas refrigerators. * * *" (Italics supplied.)

It is then charged that "the said conspiracy" caused plaintiff to be required to abandon its marketing of said refrigerators, to its loss and damage, etc.

It will be noted that there is no allegation that a com-

bination or conspiracy was entered into between Electrolux and Manitowoc to interfere with plaintiff's marketing of gas refrigerators. The charge is that the alleged *fact* that defendant refused and neglected to perform its contract with plaintiff *in itself* was a conspiracy, combination or confederation by and with Manitowoc to interfere with plaintiff's marketing of refrigerators. Where plaintiff is attempting to establish jurisdiction, as to count III, over defendant, in Illinois, it is incumbent upon it to conform to the requirement that it must first allege a conspiracy followed by an allegation of overt acts committed in pursuance thereof. *Kovar* v. *Bremer*, 294 Ill. App. 225, 231; *Brietson* v. *Woodrough*, 164 F.2d 107, 109. Only by so doing can it effectively plead a conspiracy count upon which the court can determine whether there is jurisdiction in a court in Illinois over the person of defendant. Count III is not so drawn and for that reason we hold that it does not state a cause of action against defendant enforcible in Illinois.

Hence the judgment of the court below is reversed as to count III and the cause is remanded with instructions to dismiss said count III, at plaintiff's costs.

3. By its motion to quash service of summons, defendant takes the position that Edmund A. Fenander, hereinabove referred to, upon whom summons in this case was served in New York City, was not authorized by defendant to accept service of process and that consequently said service cannot be sustained.

Relevant statutory provisions are contained in R.S. Ill. Ch. 110, 1957, as follows:

"§ 133. **Service on private corporations.** A private corporation may be served (1) by leaving a copy of the process with * * * any * * * agent of said corporation * * *.

"§ 16. **Personal service outside State.** (1) Personal service of summons may be made upon any party outside the State. If * * * upon a person who

has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; * * *.

(2) The service of summons shall be made in like manner as service within this State, * * *.

§ 17. **Act submitting to jurisdiction — Process.**

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person * * * to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State; * * *

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State."

The facts hereinbefore set forth show the relationship of Fenander to defendant.

We hold that he was an agent for service on defendant, within the meaning of §§ 13.3, 16 and 17. The affidavit of a deputy sheriff of the city of New York shows that he personally served a summons upon defendant by delivering a true copy thereof personally to Fenander. This was all that was required. The district court did not err in refusing to quash the service of summons on defendant.

For the reasons hereinbefore set forth, insofar as count III is concerned, the order from which the appeal has been taken is reversed and the cause is remanded to the district court with instructions to dismiss said count

Ill. at plaintiff's costs, and in all other respects said order is affirmed.

In Part Affirmed and In Part Reversed and Remanded with Instructions.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.